

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

NAUTILUS, INC., a Washington corporation,

Plaintiff,

v.

GATELY'S LLC, a Colorado limited liability  
company,,

Defendant.

Case No. C06-5665 FDB

ORDER GRANTING MOTION TO  
DISMISS FOR IMPROPER VENUE

This matter comes before the Court on motion of Defendant Gately's LLC to dismiss pursuant to Fed. R. Civ. P 12(b)(3) for improper venue. After reviewing all materials submitted by the parties and relied upon for authority, the Court is fully informed and hereby grants the motion to dismiss without prejudice.

**INTRODUCTION AND BACKGROUND**

This is an action for breach of contract, account stated and unjust enrichment initially brought in Clark County Superior Court by Plaintiff Nautilus, Inc (Nautilus), a Washington corporation with its principle place of business in Vancouver, Washington. Defendant Gately's LLC d/b/a Gately's Shopping Network (Gately's) is a Colorado limited liability corporation with its principal place of

1 business in Englewood, Colorado. Defendant removed the action to this court pursuant to 28 U.S.C.  
2 §1446(b) based on diversity. Defendant now moves to dismiss the action pursuant to Fed. R. Civ. P.  
3 12(b)(3) for improper jurisdiction, asserting the contract between the parties mandates that the claim  
4 must be litigated in Colorado.

5 The contractual agreement at issue was executed in Colorado while both parties were  
6 Colorado companies with their principal offices in Colorado. Nautilus, d/b/a Nautilus Health &  
7 Fitness Group (NHFG) subsequently became a Washington corporation with its principal place of  
8 business in Vancouver, Washington. Plaintiff's Complaint alleges that Gately's contracted with  
9 Nautilus to provide Gately's with fitness and strength conditioning equipment manufactured,  
10 marketed, and sold by Nautilus. Gately's retails the equipment through an internet website to  
11 customers located throughout the United States. Nautilus alleges that Gately's agreed to pay for the  
12 Nautilus products, that Nautilus fulfilled Gately's orders by shipping products, that Nautilus invoiced  
13 Gately's for these products, demanded payment of the invoices, and that Gately's has refused to pay.

14 The Nautilus Health & Fitness Group Authorized Dealer Agreement (Agreement) executed  
15 by the parties contains an exclusive venue provision that provides "[a]ny controversies or claims  
16 arising out of this Agreement shall be subject to the exclusive jurisdiction of the state or federal  
17 courts for Boulder County, Colorado." Agreement, ¶ 15.

18 Plaintiff contends that this provision of the Agreement is inapplicable, as the terms and  
19 conditions of Gately's financial obligations are governed by a "separate contract." The Agreement  
20 states at ¶ 2 that the "terms of sale for the Products shall be according to the current version of the  
21 related NHFG Terms & Conditions (Conditions) which is incorporated herein by this reference."  
22 The Agreement further provides that the "Dealer agrees to make payment for the Products in  
23 accordance with the schedule and amounts set forth in the invoices and price lists provided by  
24 NHFG, pursuant to the Conditions." Agreement, at ¶ 5. The Agreement also provides that the  
25 Dealer shall pay all amounts due in accordance with the NHFG Conditions of sale and credit policy.

1 Agreement, at ¶ 6. Finally, ¶ 17, of the Agreement provides that the Agreement, the Conditions and  
2 the Credit Application constitute the Entire Agreement and understanding of the parties.

3 The referenced Terms and Conditions (Conditions) sets forth the credit terms and financial  
4 obligation of Defendant to pay for products it orders and receives from Nautilus. The provisions of  
5 the Conditions do not contain the exclusive venue language found in the Agreement document. The  
6 language in the Conditions does however provide that the “terms and conditions, together with the  
7 NHFG Authorized Dealer Agreement [Agreement], where applicable, represent the complete  
8 agreement of the parties ...” Conditions, at ¶ 17.

#### 9 **FORUM SELECTION CLAUSE**

10 Interpretation and enforcement of contractual forum selection clauses are procedural issues  
11 to be decided under federal law. See Manetti-Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 513 (9<sup>th</sup>  
12 Cir. 1988). A forum selection clause will be enforced where venue is specified with mandatory  
13 language. Docksider, Ltd. v. Sea Technology, Ltd., 875 F.2d 762, 764 (9<sup>th</sup> Cir. 1989). To be a  
14 mandatory forum selection clause, the clause must contain language that clearly designates a forum  
15 as the exclusive one. Northern California Dist. Council of Laborers v. Pittsburg-Des Moines Steel  
16 Co., 69 F.3d 1034, 1037 (9<sup>th</sup> Cir. 1995). In contesting Defendant’s motion to dismiss, Plaintiff  
17 argues that its claims are governed by the Conditions contract and do not implicate the Agreement  
18 and its exclusive forum provision.

19 The Court disagrees. The plain language of the Agreement provides that the related NHFG  
20 Terms & Conditions (Conditions) agreement is “incorporated herein by this reference.” Where a  
21 writing refers to another document, that other document becomes constructively a part of the  
22 writing, and in that respect the two form a single instrument. Kenworthy v. Bolin, 17 Wn. App. 650,  
23 564 P.2d 835 (1977). When two or more writings are executed at the same time and involve the  
24 same transaction, they should be construed as a whole; this rule applies equally where several  
25 agreements are made as part of one transaction even though they are executed at different times.

1 Restatement (Second) of Contracts § 202(2) (1981).

2 Any controversies or claims arising out of the Agreement are be subject to the exclusive  
3 jurisdiction of the state or federal courts for Boulder County, Colorado. Accordingly, Plaintiff's  
4 claims are governed by the exclusive forum selection provision.

#### 5 **ENFORCEABILITY OF VENUE CLAUSE**

6 The Supreme Court's decision in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972),  
7 set forth the applicable standard governing the enforceability of a forum selection clause. A forum  
8 selection clause is prima facie valid and should be enforced "absent some compelling and  
9 countervailing reason." Id. at 12. The party challenging the forum selection clause must "clearly  
10 show that enforcement would be unreasonable or unjust, or that the clause was invalid for such  
11 reasons as fraud or overreaching." Id. at 15. This "heavy" burden is on the party seeking to avoid the  
12 forum selection clause because any inconvenience the plaintiff would suffer by having to litigate in  
13 the contractual forum was "clearly foreseeable at the time of contracting." Id. at 18. See also,  
14 Murphy v. Schneider National, Inc., 362 F.3d 1133, 1140 (9<sup>th</sup> Cir. 2004).

15 The Ninth Circuit has found that a forum selection clause should be followed unless: (1) its  
16 incorporation into the contract was the result of fraud, undue influence, or overwhelming bargaining  
17 power; (2) the selected forum is so gravely difficult and inconvenient that the complaining party will  
18 for all practical purposes be deprived of its day in court; or (3) enforcement of the clause would  
19 contravene a strong public policy of the forum in which the suit is brought. Argueta, 87 F.3d at 325.

20 Plaintiff does not assert that the inclusion of the forum selection clause was the product of  
21 fraud or overreaching. Plaintiff simply asserts that "the Western District of Washington is by far the  
22 most convenient forum." The Court in Bremen stated that a party seeking to avoid the forum  
23 selection clause must show "not only that the balance of convenience is strongly in favor of trial" in  
24 the plaintiff's chosen forum but also that a trial in the location designated by the clause would "be so  
25 manifestly and gravely inconvenient to [the plaintiff] that it will effectively be deprived of a

1 meaningful day in court.” Bremen, 407 U.S. at 19.

2 Plaintiff’s argument is insufficient given this standard. The Court finds that the  
3 forum-selection clause is valid and its enforcement is reasonable.

#### 4 **TRANSFER OR DISMISSAL**

5 Federal Rule of Civil Procedure 12(b)(3) allows a defendant to move for dismissal of the case  
6 on the basis of improper venue. See Fed. R. Civ. P. 12(b)(3); Agueta v. Banco Mexicano, S.A., 87  
7 F.3d 320, 324 (9<sup>th</sup> Cir. 1996); Abrams Shell v. Shell Oil Co., 165 F. Supp.2d 1096, 1102 (C.D. Cal.  
8 2001). The presence of a forum-selection clause is a valid basis for bringing a motion to dismiss for  
9 improper venue. Argueta, at 324. The governing law that should be applied in diversity cases where  
10 a forum-selection clause is present is federal law. Manetti-Farrow, Inc. v. Gucci. Am., Inc., 858 F.2d  
11 509, 513 (9<sup>th</sup> Cir. 1988).

12 Where venue is improper, the district court has the discretion to dismiss the case under Rule  
13 12(b)(3) or transfer the case in the interests of justice to an appropriate jurisdiction under 28 U.S.C.  
14 § 1406(a). King v. Russell, 963 F.2d 1301, 1304 (9<sup>th</sup> Cir.1992); Kawamoto v. CB Richard Ellis,  
15 Inc., 225 F. Supp.2d 1209, 1212 (D. Haw. 2002). In determining whether to transfer or dismiss a  
16 case, the court may consider: the applicable statute of limitations, the relative injustice imposed on  
17 the parties, whether the suit was filed in bad faith or for harassment, whether the plaintiff has  
18 requested or shown an interest in a transfer, and whether the chosen venue was clearly or obviously  
19 improper. See King, at 1304-05; Johnson v. Payless Drug Stores Northwest, Inc., 950 F.2d 586,  
20 588 (9<sup>th</sup> Cir. 1992); Wood v. Santa Barbara Chamber of Commerce, 705 F.2d 1515, 1523 (9<sup>th</sup> Cir.  
21 1983). A determination of improper venue does not go to the merits of the case and therefore must  
22 be without prejudice. In re Hall, Bayoutree Assocs., Ltd., 939 F.2d 802, 804 (9<sup>th</sup> Cir.1991).

23 Plaintiff has not argued for a transfer of the claim to another court, but instead has simply  
24 argued that venue is appropriate in this district. There is no indication that Plaintiff wants to pursue  
25 its claims in the Federal District of Colorado or Colorado state court. Because this Court can only

1 transfer the case to another federal court and Plaintiff may prefer to refile them in state court in  
2 Colorado, the Court concludes that dismissal is appropriate. Given these considerations, the Court  
3 will grant Defendant's Rule 12(b)(3) motion and dismiss this case without prejudice.

4 **CONCLUSION**

5 For the reasons set forth above Defendant's motion to dismiss will be granted.

6 ACCORDINGLY,

7 IT IS ORDERED:

8 Defendant's Motion to Dismiss Pursuant to Fed. R. Civ P. 12(b)(3) for Improper Venue  
9 [Dkt #4] is **GRANTED**, and this action dismissed, without prejudice.

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11 DATED this 20<sup>th</sup> day of December, 2006.

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15 FRANKLIN D. BURGESS  
16 UNITED STATES DISTRICT JUDGE  
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